

Redmond (Migration) [2017] AATA 1569 (7 September 2017)

DECISION RECORD

DIVISION:	Migration & Refugee Division
APPLICANT:	Mr Kevin Redmond
CASE NUMBER:	1615635
DIBP REFERENCE(S):	BCC2015/2470833
MEMBER:	David Barker
DATE:	7 September 2017
PLACE OF DECISION:	Sydney
DECISION:	The Tribunal remits the application for a Partner (Temporary) (Class UK) visa, with the direction that the applicant meets the following criteria for a Subclass 820 (Partner (Temporary)) visa: • cl.820.211 of Schedule 2 to the Regulations • cl.820.221 of Schedule 2 to the Regulations. • r.2.03A

Statement made on 07 September 2017 at 4:31pm

CATCHWORDS

Migration – Partner (Temporary) (Class UK) visa – Subclass 820 (Partner (Temporary)) – cl 820.211 – De facto relationship for 12 months before application – Structuring joint financial affairs – Sharing domestic tasks – Presenting themselves as a couple – Communication with families

LEGISLATION

1. *Migration Act 1958*, ss 5CB, 65
Migration Regulation 1994, Schedule 2 cl 820.211, 820.221, r 1.09A, r.2.03A

STATEMENT OF DECISION AND REASONS

APPLICATION FOR REVIEW

2. This is an application for review of a decision of a delegate of the Minister for Immigration on 7 September 2016 to refuse to grant the applicant a Partner (Temporary) (Class UK) visa under s.65 of the *Migration Act 1958* (the Act).
3. The applicant applied for the visa on 26 August 2015 on the basis of his relationship with his sponsor. At that time, Class UK contained only one subclass: Subclass 820 (Partner (Temporary)). The criteria for the grant of this visa are set out in Part 820 of Schedule 2 to the Migration Regulations 1994 (the Regulations). The primary criteria must be satisfied by at least one applicant. Other members of the family unit, if any, who are applicants for the visa need satisfy only the secondary criteria.
4. The delegate refused to grant the visa on the basis that the visa applicant did not satisfy cl.820.211(2) because they were not satisfied the parties were in a de facto relationship for at least 12 months ending before the date of application.
5. The applicant appeared before the Tribunal by video conference on 5 September 2017 to give evidence and present arguments. The Tribunal also received oral evidence from the sponsor.
6. For the following reasons, the Tribunal has concluded that the matter should be remitted for reconsideration.

7. BACKGROUND

8. The applicant was born in Ireland and is 35 years old. He arrived in Australia in June 2014 on a Working Holiday visa.
9. The sponsor was born in Ireland and is 27 years old. She arrived in Australia in April 2014 on a Working Holiday visa and became a permanent resident on 9 July 2015 under the Regional Sponsored Migration Scheme.
10. The visa application forms state the parties met on a building site in the Northern Territory on 25 June 2014 and commenced a de facto relationship with each other on 26 August 2014. . The parties were married in 8 October 2016. the parties oral evidence and written statements state they commenced their relationship with a matter of days following their initial meeting.
11. In the decision record, a copy of which the applicant provided to the Tribunal, the delegate stated they were satisfied the parties had established they had some joint financial commitments, were sharing a household, participated in joint activities and socialised as a couple and that they were in a committed de facto relationship. However, the delegate was not satisfied the parties were in a de facto relationship for at least 12 months before the date of application.
12. Prior to the hearing the applicant provided information to the Tribunal including but not limited to the following: written statements from the applicant and the sponsor, financial records, photographs and witness support statements.

CONSIDERATION OF CLAIMS AND EVIDENCE

13. The issue in the present case is whether the applicant and her sponsoring partner were in a genuine spousal or de facto relationship at the time of application and at the time of this decision.
14. In making its findings, the Tribunal has considered the documents contained in the Department and Tribunal files and oral evidence provided by the applicant, sponsor and witness at the hearing. The Tribunal has the benefit of considerably more evidence than was available to the Department at the time of the delegate's decision.
15. The parties' oral evidence regarding the circumstances in which they met, the development of their relationship and their current living circumstances was consistent and credible. Their oral evidence during the hearing was also consistent with the very extensive documentary evidence provided with the review application. The Tribunal found the parties to be credible witnesses who gave their evidence in a calm, rational manner without embellishment.

WHETHER THE PARTIES ARE IN A SPOUSE OR DE FACTO RELATIONSHIP

16. Clause 820.211(2)(a) and 820.221 require that at the time the visa application was made, and at the time of this decision, the applicant is the spouse or de facto partner of an Australian citizen or Australian permanent resident or an eligible New Zealand citizen. In the present case the applicant claims to be the de facto partner of the sponsor who is a permanent resident of Australia.

ARE THE PARTIES IN A DE FACTO RELATIONSHIP?

17. 'De facto partner' is defined in s.5CB of the Act and provides that a person is in a de facto relationship with another person to whom they are not married if they have a mutual commitment to a shared life to the exclusion of all others, the relationship is genuine and continuing, the couple live together, or do not live separately and apart on a permanent basis, and the couple are not related by family: s.5CB(2).
18. In forming an opinion whether they are in a de facto relationship consideration must be given to all of the circumstances of the relationship. This includes evidence of the financial and social aspects and the nature of the parties' household and their commitment to each other as set out in r.1.09A(3) which is attached to this decision.
19. The Tribunal has reviewed the considerable amount of bank and other financial records, witness support statements, photographs and the oral and written evidence provided by the applicant and sponsor. On the basis of this evidence and in relation to the parties' relationship the tribunal makes the following findings:
 - The parties were at the time of application and at the present time sharing regular expenses, pooling their finances and generally structuring their financial affairs in a manner which is indicative of two people in a genuine and continuing relationship;
 - The parties had established at the time of application and continue to at the present live in a shared household. They have at all times resided in privately rented accommodation. The parties share domestic tasks in a somewhat traditional manner, that is, the sponsor is responsible for cooking, cleaning the house and washing clothes and the applicant is responsible for yard work and pool cleaning. Notwithstanding this, the parties run their household in a manner which is indicative of a couple in a genuine and continuing relationship;

- The parties were at the time of application and continue to at the present representing themselves to family, friends, health professionals, employers and other instrumentalities as a couple. The parties maintain regular communication with and have the support of their respective families for their relationship. The parties plan and undertake joint social activities and have arrangements in place to travel together to Ireland to visit their respective families over the 2017 Christmas period.
- The Tribunal finds that the applicant and her sponsor have been in a committed relationship since August 2014. The Tribunal accepts the parties have a commitment to supporting each other in relation to their career aspirations, their ongoing connections to their families of origin and their plans to raise their own family;
- The parties married in Darwin on 8 October 2016;
- The Tribunal is satisfied the parties see their relationship as stable, mutually supportive and long-term. The Tribunal considers the parties' evidence with regard to their commitment to each other to be plausible, persuasive and sincere.
- The extent to which the parties support each other and are committed to the welfare of each other provides significant weight in support of a finding that they are in a genuine and continuing spousal relationship.

20. Conclusion on spouse and de facto criteria

21. Having regard to all the circumstances of this relationship, the Tribunal is satisfied that the parties have a mutual commitment to a shared life together to the exclusion of all others. The Tribunal is satisfied that the relationship between them is genuine and continuing. The Tribunal finds the parties live together and have not lived separately and apart on a permanent basis since in or around July 2014. The parties are not related by family.
22. On the basis of the above the Tribunal is satisfied that the requirements of s.5CB(2) are met at the time of the application and is satisfied that the requirements of s.5F are met at the time of the decision.
23. The parties are both over the age of 18 years and therefore the criteria in cl.820.211(2)(c) is satisfied. At the time of application, the applicant held a substantive visa and so the criteria in cl.820.211(2)(d) is not relevant.
24. The Tribunal further finds that at the time of this decision the applicant is the sponsor's spouse, and therefore continues to meet the requirements of cl.820.211(2).
25. Therefore, the applicant meets cl.820.211 and cl.820.221.

ARE THE ADDITIONAL CRITERIA FOR A DE FACTO RELATIONSHIP MET?

26. Persons lodging an application for a partner visa on the basis of being in a de facto relationship must also meet the additional criteria in r.2.03A. These are: that the couple are both at least 18 years of age; and with limited exceptions, that the applicant has been in the de facto relationship for at least the period of 12 months ending immediately before the date of the application, unless he or she can establish compelling and compassionate circumstances for the grant of the visa. The requirement that the relationship existed for 12 months prior to the application does not apply in certain circumstances where the sponsor is or was a humanitarian visa holder, or for applications made on or after 9 November 2009,

where the de facto relationship has been registered under a relevant State or Territory law: r.2.03(4), (5).

27. The Tribunal accepts that the parties are clearly devoted to each other and to their marriage, which took place in October 2016. The exception to the requirement that the parties had been living together for at least the period of 12 months ending immediately before the date of the application by having their relationship registered is an exception created by the legislation. The legislation does not provide that the exception exists if the parties then marry. A valid marriage does not, in and of itself satisfy the requirement the de facto relationship be registered under a relevant State or Territory law.
28. The delegate from the Department was not satisfied the parties had, as claimed by them, commenced their de facto relationship in August 2014 and that it appeared their relationship prior to December 2014 was more a boyfriend/girlfriend relationship. The Tribunal has considered the available evidence in relation to this issue.
29. During the hearing the applicant said he and the sponsor formed a strong connection soon after meeting and this was due to mutual attraction and also influenced by being two people sharing an Irish cultural heritage in a very different geographical and cultural context in the Northern Territory of Australia. He said they stayed with each other in their respective rental apartments from when their relationship started, in or around the beginning of July 2014. he said they had contact with each other's families, by Skype, within a matter of weeks of their relationship commencing. This is consistent with the sponsor's evidence and that contained in a statutory declaration from the applicant's mother, Mrs Sarah Redmond, dated 14 May 2015, who states that at that time she was aware the parties had been together for around nine months.
30. The applicant commented on the delegate's concern their financial and rental records did not show they shared accommodation costs until December 2014. He said this reflected their having existing, separate rental commitments when they first met. He said the sponsor's lease ran out in December 2014 and at this time she moved formally into the apartment he was then renting with other people. He said they secured a larger bedroom in this share household, which had its own ensuite bathroom. He said they have subsequently moved to a three bedroom house, which they do not share with other people. This is consistent with the oral evidence of the sponsor and information contained in written statements provided with the review application.
31. The tribunal was satisfied the applicant and sponsor are credible witnesses and does not share the concern held by the delegate that they were in a somewhat committed but insufficiently genuine relationship in the four months prior to December 2014. The tribunal finds that the parties commenced their de facto relationship in June 2014 and that accordingly it was in existence on or before 12 months prior to 26 August 2015. As has been noted elsewhere in this decision, both parties are over the age of 18 years.
32. For these reasons the Tribunal is satisfied that the applicant meets the additional criteria prescribed in r.2.03A.
33. Given the findings above, the appropriate course is to remit the application for the visa to the Minister to consider the remaining criteria for a Subclass 820 visa.

DECISION

34. The Tribunal remits the application for a Partner (Temporary) (Class UK) visa, with the direction that the applicant meets the following criteria for a Subclass 820 (Partner (Temporary)) visa:

- cl.820.211 of Schedule 2 to the Regulations
- l.820.221 of Schedule 2 to the Regulations.
- r.2.03A

David Barker
Member

ATTACHMENT - EXTRACT FROM MIGRATION REGULATIONS 1994

1.09A DE FACTO PARTNER AND DE FACTO RELATIONSHIP

- (1) For subsection 5CB (3) of the Act, this regulation sets out arrangements for the purpose of determining whether 1 or more of the conditions in paragraphs 5CB (2) (a), (b), (c) and (d) of the Act exist.

Note 1 See regulation 2.03A for the prescribed criteria applicable to de facto partners.

Note 2 The effect of subsection 5CB (1) of the Act is that a person is the de facto partner of another person (whether of the same sex or a different sex) if the person is in a de facto relationship with the other person.

Subsection 5CB (2) sets out conditions about whether a de facto relationship exists, and subsection 5CB (3) permits the regulations to make arrangements in relation to the determination of whether 1 or more of those conditions exist.

- (2) If the Minister is considering an application for:
- (a) a Partner (Migrant) (Class BC) visa; or
 - (b) a Partner (Provisional) (Class UF) visa; or
 - (c) a Partner (Residence) (Class BS) visa; or
 - (d) a Partner (Temporary) (Class UK) visa;

the Minister must consider all of the circumstances of the relationship, including the matters set out in subregulation (3).

- (3) The matters for subregulation (2) are:
- (a) the financial aspects of the relationship, including:
 - (i) any joint ownership of real estate or other major assets; and
 - (ii) any joint liabilities; and
 - (iii) the extent of any pooling of financial resources, especially in relation to major financial commitments; and
 - (iv) whether one person in the relationship owes any legal obligation in respect of the other; and
 - (v) the basis of any sharing of day to day household expenses; and
 - (b) the nature of the household, including:
 - (i) any joint responsibility for the care and support of children; and
 - (ii) the living arrangements of the persons; and
 - (iii) any sharing of the responsibility for housework; and
 - (c) the social aspects of the relationship, including:
 - (i) whether the persons represent themselves to other people as being in a de facto relationship with each other; and
 - (ii) the opinion of the persons' friends and acquaintances about the nature of the relationship; and
 - (iii) any basis on which the persons plan and undertake joint social activities; and
 - (d) the nature of the persons' commitment to each other, including:
 - (i) the duration of the relationship; and
 - (ii) the length of time during which the persons have lived together; and
 - (iii) the degree of companionship and emotional support that the persons draw from each other; and
 - (iv) whether the persons see the relationship as a long term one.
- (4) If the Minister is considering an application for a visa of a class other than a class mentioned in subregulation (2), the Minister may consider any of the circumstances mentioned in subregulation (3).